United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7601

To be argued by
A. SETH GREENWALD

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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WARREN DONAHUE, SANDRA WEISMAN, VALDA BROMWELL, ROY G. VANASCO, JOHN T. STEWART, NICHOLAS A. LONGO, LYNDON LA ROUCHE, THE ROCKLAND COUNTY CONSERVATIVE PARTY, AND THE LABOR PARTY,

Plaintiffs-Appellants,

-against-

BOARD OF ELECTIONS OF THE STATE OF NEW YORK, BOARD OF ELECTIONS OF THE CITY OF NEW YORK, SECRETARY OF THE STATE OF NEW YORK, BETTY DOLEN AND HUGH CAREY,

Defendants-Appellees,

On Appeal From the United States District Court For The Eastern District of New York

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BRIEF FOR SECRETARY OF STATE AND GOVERNOR OF THE STATE OF NEW YORK HUGH CAREY

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MISCELLANEOUS

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BRIEF FOR SECRETARY OF STATE AND GOVERNOR OF THE STATE OF NEW YORK HUGH CAREY

Questions Presented

1. Is the appeal moot?

2. Did the District Court properly refuse a preliminary injunction and dismiss the complaint?

Statement

This is an appeal by plaintiffs-appellants from a denial of a preliminary injunction and dismissal of the complaint by the District Court (Mishler, C.J.) (78a).* The plaintiffs-appellants included Republican and Conservative Party supporters of ex-President Gerald R. Ford as well as an "unrecognized"** third party in New York, the Labor Party, and its candidate for President in the 1976 election, Lyndon La Rouche.

Facts and Proceedings

The plaintiffs brought a complaint charging the Board of Elections of the City of New York with wrongful acts and slipshod procedures in the administration of mail registration and the conduct of the 1976 Presidential election in New York. It was contended numerous illegal ballots were cast. It was alleged there was chaos and

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* Numbers in parentheses refer to Appendix.
**Cf. N.Y. Election Law § 2(4).

confusion on election day (60a-61a). The plaintiffs sought (1) to enjoin certification of the Presidential electors, (2) a declaration that the election was null and void and (3) a new election.

The defendants all moved to dismiss and same was denied, although the complaint was held not to state a cause of action. (Order of December 7, 1976)(60a). An expedited hearing was scheduled on the motion for a preliminary injunction.

The District Court held the plaintiffs must allege and prove:

> "(1) that specific acts of fraud or other unlawful behavior were committed in the conduct of the election; (2) the fraud or other unlawful behavior was committed with the intent or purpose of depriving qualified voters of their constitutionally protected right to vote; (3) the fraud or other unlawful behavior was committed by persons acting under the color of state law; and (4) the fraud or other unlawful behavior changed the outcome of the election."(69a).

Thereafter an evidentiary hearing (or trial) was held on December 8 and 9, 1976.* As the opinion recites (78a et seq.) the plaintiffs sought to prove through the use of statistical survey techniques that the Presidential election had widespread irregularities which "probably deprived President Ford's electors of their victory" (81a). Some 2434 "frauds" were (80a) uncovered which were projected to a range of 138,207 (minimum) to 306,108 (maximum) "irregular" votes (80a). Plaintiffs admittedly had a polling "universe"** restricted to urban areas in New York State and comprising only 42% of the voter population. Their own expert (Dr. George E. Bardwell) testified that the appropriate universe was the entire State (83a).

Opinion Below

The District Court (Mishler, C.J.), in ruling against a preliminary injunction, held that the plaintiffs had failed to show that election practices in unsampled areas were similar to those in sampled areas (83a).

* It should be noted that the electors were scheduled to meet in Albany shortly to cast their ballots. Election Law § 292.

**Opin. def. (81a), citing Dooling Polls, Samples, Surveys and Scientific Evidence (Feb. 1962).

Even if the sample was proper, the "evidence" of voting irregularities was susceptible of inferences other than fraud (83a).

Even if the maximum number of 306,107 "fraudulent" votes was accepted there was a failure of proof that the outcome of the election would have been any different in the absence of fraud. There was no evidence of the partisan nature of the vote. Generously conceding 90% of the "extrapolated fraudulent vote" to Jimmy Carter, it constituted 275,469 votes or less than the Carter margin of 288,767 in New York.

In summary, plaintiffs had failed to prove (1) specific acts of fraud by persons acting under color of state law and (2) that the "irregularities", if eliminated, would have changed the result of the election.

The order dismissed the complaint, as well as denied a preliminary injunction.

Thereafter plaintiffs sought a stay from this Court, which was denied December 13, 1976 and from the Supreme Court, which was denied December 27, 1976 (Marshall, J.).

POINT I

THE ACTION IS MOOT.

The plaintiffs sought injunctive relief basically directed to conducting a new presidential election in New York. To that end they sought to enjoin defendants from certifying any slate of Electors in New York pledged to James (sic) Carter for President and a new election for the office of Electors from New York State.

It cannot be denied that the Electors from New York have now performed their constitutional office and cast their votes for Jimmy Carter. Those votes have been transmitted to Washington, D.C., counted, the successful candidate (Jimmy Carter) certified. Indeed, as we all know, he was inaugurated January 20, 1977 as the 39th President of the United States. Appellants do not deny any of this. Indeed, they positively state (Br., p. 3); "(f)or good and practical reasons, these appellants do not seek by this appeal to decertify the election of James Earl (sic) Carter as President of the United States of America." Still they seek to "overturn the legal criteria formulated by the Court below" and contend the action is not moot.

Appellants contend that (1) this is a controversy capable of repetition, yet evading review, (2) this is a class action and (3) this is an action for damages.

As to defendants Secretary of State and the Governor, the action is certainly moot as they only played, at most, a ministerial act in certifying the election of the Electors (62a). They were only parties to the injunctive aspect of the suit. Regardless of the District Court charactization (62a-63a) Hugh Carey, the Governor of the State of New York, is not properly made a defendant-appellee since he has no special responsibility for the enforcement of the statute and operation of the electoral process herein involved, over and above his general duties as Chief Executive of the State. New York Constitution, Article IV, § 1. Fitts v. McGhee, 172 U.S. 516, 19 S. Ct. 269 (1899); Oliver v. Board of Education, 306 F. Supp. 1286 (S.D.N.Y. 1969); Camacho v. Rogers, 199 F. Supp. 155 (S.D.N.Y. 1961); Coon v. Tingle, 277 F. Supp. 304 (N.D. Ga. 1967). Likewise the Secretary of State of the State of New York has no statutory duties as to enrollment of voters or conduct of the elections.

The local Boards of Elections have custody of the registration records and conduct of the election. Therefore judgment was properly entered as to the two defendants, Carey and the Secretary of State, dismissing the complaint. McCrimmon v. Daley, 418 F. 2d 366 (7th Cir. 1969). At this time the matter is moot.

The Secretary of State has only ministerial functions in regard to certifying the results of the election. Whelan v. Cuomo, 415 F. Supp. 251, 253 (E.D.N.Y. 1976) citing Matter of Hart, 161 N.Y. 507, 55 N.E. 1058 (1900).

The appellants' appeal is also moot because this is not truly a controversy capable of repetition, yet evading review. Rosario v. Rockefeller, 410 U.S. 752, 756, n. 5 (1973). Such cases in election matters concern the constitutionality of statutes which continue in effect unamended. No such challenge to a statute is involved herein. Rather appellants claimed that highly specific and extraordinary events occurred in the 1976 New York election

to warrant an injunction and a new election. This is moot.*

The claim of a class action also do not save the appeal from being moot. This was a "class action" brought by plaintiffs "as representatives of all other qualified voters enrolled in the State of New York who, in the Presidential Election on November 2, 1976, were denied the right to vote ..." (3a, Compl., Class Action Allegations). Thus it did not involve any other election. What will happen at the next presidential election (1980) is hypothetical. Regardless of the class action aspects, the controversy has become moot as to defendants and the entire class (voters at the 1976 election) and it remains moot. Sosna v. Iowa, 419 U.S. 393, 402-403 (1975). The threat of injury herein is now non-existent as to the 1976 election. It is decidedly "conjectural" or "hypothetical" as to future events or elections. O'Shea v. Littleton, 414 U.S. 488,

*Even if appellants have "clearly articulated fears" that frauds of a widespread nature will occur in the future, this does not state a cause of action or prevent mootness. It is premature and assumes violations of state Election Law. Cf. Whalen v. Roe, __ U.S. __ 51 L.Ed. 2d 64, 74, n. 27 (1977).
It is unrealistic to assume public officials will not enforce or violate the law. Sanders v. Wyman, 464 F. 2d 488, 491, n. 3 (2d Cir. 1972), cert. denied 409 U.S. 1126. No defendant herein purports to condone voting irregularities or frauds.

494 (1974); Golden v. Zwickler, 394 U.S. 103, 109-110 (1969).

Finally, the claim for damages ($2,000,000) was not directed at defendants Secretary of State and Carey. There was no claim they committed any frauds. They acted in a ministerial capacity. Even so the claim for damages must have some reality. Here the appellants sought to recover damages, representing the amount expended by plaintiffs in the 1976 Presidential campaign in New York (73a, n. 10). However there is no question the election was valid and finished so there is no continuing basis for a damage claim. The cases involving electoral offices such as Bond v. Floyd, 385 U.S. 116, 128, n. 4 (1966) and Powell v. McCormack, 395 U.S. 486 (1969) involve the right to an office and the concommitent right to back salary. Thus obtaining the office in question did not end the case. In the instant case the 1976 election will not be rerun and thus appellants have no right to damages.

An added point, the appellants seem to claim stare decisis (Br. p. 6) as a grounds to avoid mootness. This is frivolous. Every decision has stare decisis effect, but it does not survive mootness for that reason. Any new

case presents new facts. That the peculiar circumstances of a new mail registration law (Election Law § 153) will not repeat itself in the future is obvious. That they will be some irregularities and frauds in the future of unknown dimensions may be assumed but this is not a basis for continuing jurisdiction. Powell v. Power, 436 F. 2d 84, 88 (2d Cir. 1970).

POINT II

THE DISTRICT COURT PROPERLY REFUSED A PRELIMINARY INJUNCTION AND DISMISSED THE ACTION.

There can be no question that the preliminary injunction was properly denied. Appellants make no claim otherwise.

As to dismissal, we submit that the District Court's findings, after an evidentiary hearing or trial are not "clearly erroneous", Fed. Rules of Civil Procedure 52(a). While appellants complaint of application of criminal law standards they were never used. (See Appellee State Board's Br., Pt. II, pp. 3-6 by the District Court in dismissing the complaint).

Accepting all of appellants' proof at the evidentiary hearing, without any rejection, the District Court only applied the criteria found at 62a, (1), (2), (3) and (4). This was not a criminal standard. In a highly similar action in Ohio, Conn v. Brown, (S.D. Ohio, C-2-76-851) (December 9, 1976), the District Court applied the same standards (p. 15, slip opinion) in denying a preliminary injunction:

> "As this Court perceives these cases, a litigant has stated a constitutional claim, under 42 U.S.C. § 1983, based upon election fraud for which relief may be granted when he has alleged (1) actual fraud in the election process; (2) committed with the intent or purpose of depriving voters of their constitutional right to have their votes honestly counted; (3) committed by a person acting under color of state law; and (4) changing the outcome of the election."

That Court cited Hennings v. Grafton, 523 F. 2d 861 (7th Cir. 1975); Pettengill v. Putnam Co. R-1 School District, 472 F. 2d 121 (8th Cir. 1973); Powell v. Power, supra, 436 F. 2d 84; Lehner v. O'Rourke, 339 F. Supp. 309 (S.D.N.Y. 1971). These are the same cases the District Court below cited (66a, 68a) as well as others.

While the federal courts are not without power to redress deprivations of constitutional rights in elections, such power is not to be invoked lightly. Starr, Federal Invalidation of State Elections, 49 N.Y.U.L. Rev. 1092, 1124-27 (1974). Errors and irregularities, even if accepted as frauds, are inevitable in our society's method of conducting elections. No constitutional guarantee exists to remedy them. Rather, state election laws must be relied upon to provide the proper remedy. Hennings v. Grafton, supra at 865.

In the final analysis, the gist of appellants' complaint seems to be that provisions of the New York Election Law were violated at the 1976 general elections. We submit this raised only questions of state law not cognizable in the federal court. Obviously whether a voter was qualified to vote was a question of state law absent some claim that federal constitutional rights were violated. No claim of racial discrimination was involved herein. Cf. Newell v. Troy, 343 F. Supp. 1253 (E.D.N.Y. 1972).

CONCLUSION

THE APPEAL SHOULD BE DISMISSED AS MOOT OR THE ORDER BELOW AFFIRMED.

Dated: New York, New York
April 13, 1977

Respectfully submitted,

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: SS.:
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BERNADETTE MERLINO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for State Appellees herein. On the 15th day of April , 1977, she served the annexed upon the following named person :

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Attorneys in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the addresses within the State designated by them for that purpose.

Bernadette Merlino

Sworn to before me this
15th day of April , 1977

A. Seth Greenwald
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